82-2058

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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, Trading and
Doing Business as NELSON HOUSE,
Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Pennsylvania Act of Assembly, requiring a Pennsylvania private institution to pay for the public education of a mentally retarded child residing therein, whose parents are New Jersey residents, violate the Equal Protection Clause, when all Pennsylvania mentally retarded children are provided a free public education?

2. Is it not a violation of Section 504 of the Federal Rehabilitation Act of 1973 for respondent, a recipient of federal funds, to charge tuition to educate a mentally retarded child residing in respondent's school district in Pennsylvania, having parents residing in New Jersey, when all Pennsylvania mentally retarded children are provided a free public education?

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REFERENCE TO OPINIONS BELOW

The Opinion of the Court of Common Pleas of Huntingdon County, Pennsylvania, is in the Appendix and is not reported.

The Opinion of the Pennsylvania Commonwealth Court is reported at 57 Commonwealth Ct. 514 (1981), 426 A.2d 1234. A copy of the Opinion is set forth in the Appendix.

The Opinion of the Pennsylvania Supreme Court is not yet officially reported. A copy of the Opinion is set forth in the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

The Judgment of the Supreme Court of Pennsylvania, Eastern District, was dated and entered on March 16, 1983.

The statutory basis for this Court's jurisdiction is 28 U.S.C. Section 1257(3), in that this is a Petition for Writ of Certiorari seeking review of the Judgment of the Supreme Court of Pennsylvania, Eastern District, affirming the Order of the Commonwealth Court of Pennsylvania filed March 16, 1981, affirming the Judgment of the Pennsylvania Huntingdon County Court of Common Pleas filed December 20, 1979.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fourteenth Amendment

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1308 of the Pennsylvania Public School Code of 1949, Act of March 10,1949, P.L. 30, Art. XII, Sect. 1308, 24 P.S. 13-1308

If any inmates have been received from outside of Pennsylvania, or if the institution cannot certify as to their residence, their tuition shall be paid by the institution having the care or custody of said children. . . .

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; Pub. L. 93-112, Title V, Sect. 504, Sept. 26, 1973, 87 Stat. 394

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Department of Health, Education and Welfare Regulation No. 84.33, 42 C.F.R. 84.33(a) and (b)

(a) GENERAL. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) APPROPRIATE EDUCATION. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§84.34, 84.35, and 84.36.

Appendix A — Analysis of Final Regulation, Subpart D — Preschool, Elementary and Secondary Education to Regulation No. 84.33, Note 23

23. FREE APPROPRIATE PUBLIC EDUCATION. Former §§84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new

§84.33. Under §84.34(a), a *recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence*. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility. (Emphasis supplied)

STATEMENT OF THE CASE

This is an action in Assumpsit commenced June 20, 1975, by Respondent, Intermediate Unit, against Petitioner residential care provider in Huntingdon County, Pennsylvania, Court of Common Pleas, to recover the cost of educating Lawrence F. Terwilliger, for the 1973–74 school year.

On July 9, 1975, the case was removed to the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 75-1987, on the ground that the Court had theretofor assumed and retained jurisdiction of all matters covered by the Huntingdon County action in *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.*, 343 F. Supp. 279 (1972) then assigned to the Honorable Edward R. Becker. There the Commonwealth of Pennsylvania had consented, on behalf of all of the Intermediate Units in the Commonwealth,

> "43. Every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972." 343 F.Supp. 279, 314 (1972)

While the action was pending in the Federal District Court an Answer was filed conforming to the Federal Rules. The Fifth Defense alleged that like any citizen of the United States moving from one state to another, the said Larry Terwilliger is entitled to the equal protection of the laws of the United States of America. The Sixth Defense raised the issue of lack of due process and the Seventh Defense averred that it would be a confiscation of property without legal authority or basis in law to require petitioner to pay for the education of Larry Terwilliger. The case was remanded to the Huntingdon County Common Pleas Court by Order of the Honorable Edward R. Becker, dated December 23, 1976.

Upon return to Huntingdon County, the matter was referred to arbitrators, who awarded, on January 19, 1978, the respondent $1,687.09, plus interest and costs.

An appeal of the award was taken to the Huntingdon County Common Pleas Court and hearing thereon held June 20, 1978 before the Honorable Morris M. Terrizzi.

At the trial, the parties agreed upon the following statement of facts:

On June 26, 1972, Lawrence Fran Terwilliger, (hereinafter called "Larry"), was transferred from the Lochland School, Inc., in Geneva, New York, to Nelson House, located at Spruce Creek in Huntingdon County, Pennsylvania. This was a private placement arranged by Larry's parents. Larry was born June 11, 1959, of parents residing in New Jersey, divorced at the time of said transfer, the mother, residing at 366 Beveridge Road, Ridgewood, New Jersey, and known as Mrs. William A. (Carol J.) McManus.

Petitioner, Nelson House, is licensed by the Pennsylvania Department of Public Welfare as an institution providing residential care for mentally retarded children and is operated by Edgar D. Nelson, trading as Nelson House.

On October 31, 1973, Respondent, Tuscarora Intermediate Unit No. 11, declined to enroll Larry in its program for trainable mentally retarded students on the ground that Larry's parents were residents of New Jersey. Upon application to the Pennsylvania Department of Education by Petitioner, The Right to Education Office in the Division of Special Education directed the Respondent to enroll Larry, which Respondent did. Under date of August 9, 1974, Tuscarora Intermediate Unit No. 11 billed Nelson House for tuition for Larry for the 1973–74 school year, itemized as 114 days at $10.01 per day, or $1,141.14, subsequently changed to read $1,687.09.

Upon the filing of the Consent Decree in the case of *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.*, 334 F.Supp. 1257 (E.D. Pa. 1971), 343 F.Supp. 279 (E.D. Pa. 1972), in which the court assumed jurisdiction over, among others, all of the Intermediate Units in the Commonwealth of Pennsylvania, all retarded and handicapped children who were residents of the Commonwealth of Pennsylvania were entitled to a free education. This decree does not address the question of whether or not a child

physically present in Pennsylvania, living in a facility licensed by the Pennsylvania Department of Public Welfare, whose parents reside outside of Pennsylvania, is entitled to a free education from Pennsylvania.

At the time of placement of Larry at the home of Petitioner, there was no written agreement between Petitioner and Larry's mother or father. Petitioner orally agreed to provide Larry with residential support at the cost of $600.00 per month. This arrangement continued through the 1975–76 school year, at which time Larry ceased to live in Pennsylvania. Petitioner received no funding from the Commonwealth of Pennsylvania or the State of New Jersey for the care, maintenance, support or education of Larry.

Larry did not live at home with his family because the family—neither his natural mother, nor his natural father—could cope with his problems and demands. Larry did not live in the State of New Jersey because a suitable residential facility and program could not be found. Larry has limitations of immature behavior and lack of self-control.

Respondent has not sought to recover the cost of education of Larry from Larry's parents.

Respondent was receiving federal funding at the time Larry was enrolled with Respondent and continued to do so throughout the entire period Larry lived in Pennsylvania.

Before the Arbitrators, the Common Pleas Court, and the two appellate courts Petitioner raised the issues of unjust discrimination under Section 504 of the Rehabilitation Act of 1973, as well as violation of the Equal Protection Clause. In each case the court held such arguments were without merit.

On December 20, 1979, the Common Pleas Court (Honorable Morris M. Terrizzi) filed its Opinion and Verdict in favor of the respondent for $1,687.09, with interest from June 20, 1975. After judgment was entered thereon, an appeal to the Commonwealth Court was perfected. On March 16, 1981, the Commonwealth Court (Craig, J.) filed an Opinion and Order affirming the judgment of the court below, 57 Commonwealth Ct. 514 (1981), 426 A.2d 1234.

On June 30, 1981, appellant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was granted, argument had thereon on December 8, 1982, and the Opinion and Judgment filed March 16, 1983, affirming the Order of the Commonwealth Court.

ARGUMENT

This Court has had an opportunity recently to review matters similar to the issues raised in this Petition, namely, *Plyler v. Doe*, 457 U.S. ____, 72 L.Ed.2d 786, 102 S.Ct.____(1982) and *Martinez v. Bynum*, No. 81-857, U.S. ____, ____ L.Ed.2d ____,102 S.Ct. ____ (1983), 51 Law Week 4524.

In *Plyler v. Doe, supra*, this Court held that a Texas statute witholding funds from local school districts for education of children not legally admitted into the United States and authorizing districts to deny enrollment to such children violated the equal protection clause of the Fourteenth Amendment. There this Court held that the plaintiff children of the illegal migrants from Mexico are special members of the underclass, that the children were not comparably situated to their "parents who have the ability to conform their conduct to societal norms," and that the children "can effect neither their parents conduct nor their own status." This Court further said that "even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."

This Court again stated that public education is not a fundamental right guaranteed by the Constitution but did again reiterate that where the state has undertaken to provide a free education, it is a right which must be made available to all on equal terms: 72 L.Ed.2d 803.

The admitted and agreed facts in this case are that the Commonwealth of Pennsylvania agreed to provide all retarded and handicapped children who are residents of the Commonwealth of Pennsylvania a free education (Statement of the Case, p. 4, 5). Further it was agreed and admitted that "Larry did not live in the State of New Jersey because a suitable residential facility and program could not be found." (Statement of the Case, p. 6). The Pennsylvania Supreme Court affirmed this fact, which was related to be undisputed, that when the lad was transferred from Geneva, New York to Huntingdon County, Pennsylvania, "the child did not move to New Jersey because a residential facility could not be found there that was suitable to his needs." (A-2).

Thus there is here a situation of compelling necessity. Just as in *Plyler*, where this Court found the Texas statute violative of the Fourteenth Amendment because it imposed a lifetime hardship on a discrete class of children not accountable for their disabling status, there is here a discrete class of children who cannot reside with their parents in the State of New Jersey because there is no suitable residential facility and program.

About a month ago on May 2, 1983, this Court decided *Martinez v. Bynum, supra*, upholding the same Texas statute providing a free public education to any child properly residing in Texas living apart from his parent, guardian or person having lawful control of him on the condition that such child's presence is for other than "the primary purpose of attending the public free schools." There this Court rejected a challenge to the statute on its face. It held a *bona fide* residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for the State's residents are enjoyed only by residents. It further held that a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional basic residence criteria, *i.e.*, to live in the district with a *bona fide* intention of remaining there and that so long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test.

Mr. Justice Brennan, concurring in *Martinez*, pointed out that *Martinez* only involved a facial challenge to the constitutionality of the Texas statute but that the Court does not pass on its validity as applied to children in a range of specific factual contexts.

In the context of this Petition it is clear that the State of New Jersey, where the parents of the child resided, was unable to provide Lawrence F. Terwilliger with an education, free or otherwise, because as a fact "a residential facility could not be found there (in New Jersey) that was suitable to his needs."

Under the compulsory education laws it was necessary for Petitioner to require the Pennsylvania Department of Educa-

tion to compel respondent to provide this education. (Statement of the Case, p. 5).

Pennsylvania, fortunately, had such a facility, namely, that of Petitioner. As aforesaid, all Pennsylvania children, similarly situated, are provided with a free education. It is a violation of the Equal Protection Clause not to provide this child, required under the circumstances to reside in Pennsylvania, with a free public education.

In addition to the foregoing substantial reason for granting this Petition for Certiorari, there is an equally compelling reason, namely, the charging of the tuition to educate the child violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. This Section mandates that no handicapped individual shall be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program receiving Federal financial assistance. It was here admitted that respondent received Federal financial assistance. (Statement of the Case, p. 6).

In Appendex A to Final Regulation 84.33 of HEW, Note 23, appearing as the last item in the Constitutional, Statutory and Regulatory Provisions Involved, p. 3, it is said:

> . . . a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence.
> . . .

Having received Federal financial assistance, respondent is *obliged to provide a free appropriate public education to the* child "in" the jurisdiction.

In its provincial attempt to justify its avoidance of providing a free education the Pennsylvania Supreme Court said in its Opinion (A-6): "And Nelson House has made no claim that they are bringing this suit on the child's behalf. . . ." A moment's reflection would have indicated that Nelson House was not bringing the suit but was sued.

The Pennsylvania Supreme Court dismissed Petitioner's Section 504 of the Rehabilitation Act argument on the ground

that Petitioner was clearly never intended to have standing to seek refuge under this federal statute. But Congress added Section 505 by Pub. L. 95-602, Title 1, Section 120, Nov. 6, 1978, 92 Stat. 2982, 29 U.S.C. 794a, providing that remedies, procedures and rights shall be available to any person aggrieved by any act or failure to act by any recipient of Federal Assistance or Federal provider of such assistance under Section 794 (Section 504 of the Rehabilitation Act).

Surely Petitioner is a person aggrieved.

The use of the phrase "any person aggrieved" in Section 505 (a) (2) evinces a congressional intention to define standing to bring or defend a private action under Section 504 as broadly as is permitted by Article III of the Constitution: *Nodleman v. Aero Mexico*, 528 F. Supp. 475 (1981).

The Supreme Court has recognized that a person may sue to enforce the rights of others under Civil Rights statutes that confer standing to the full extent permitted by Article III where: (1) "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court", *Barrows v. Jackson*, 346 U.S. 249, 257,73 S. Ct. 1031, 1035, 97 L. Ed. 1586 (1953), *Nodleman v. Aero Mexico*, Supra.

The amendment adding 29 U.S.C. 794a making remedies, procedures and rights available to any person aggrieved is applicable to actions then pending: *Shirey v. Devine*, 670 F. 2d 1188 (1982); *Counts v. U.S. Postal Service*, 631 F. 2d 46 (1980).

Clearly, then, Petitioner, as an aggrieved party, may affirmatively use Section 504 of the Rehabilitation Act of 1973 to thwart this onerous suit.

CONCLUSION

This case presents a specific factual context involving a statute manifestly violative of the Equal Protection Clause, when applied to Lawrence F. Terwilliger, who could not find a place to reside in New Jersey, but in Pennsylvania, where Petitioner has sought to help him. It is rank discrimination to provide a free education to all of Pennsylvania's mentally retarded children regardless of where their parents reside, but to deny a free education to this unfortunate child born of New Jersey parents.

WHEREFORE, Petitioner respectfully urges this Court to grant his Petition for Certiorari.

Respectfully submitted,

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[J-355]

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant* v. TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	No. 81-3-426 Appeal from the Order of the Commonwealth Court at No. 51 C.D., dated March 16, 1981, affirming the Order of the Common Pleas Court of Huntingdon County, at No. 60 September Term, 1975 ARGUED: December 8, 1982

OPINION

MR. JUSTICE McDERMOTT FILED: March 16, 1983

This is an appeal from the order of the Commonwealth Court[1], which affirmed the decision of the Court of Common Pleas of Huntingdon County[2], granting appellee a judgment of $1,687.09 plus interests and costs as against appellant for the educational costs for school year 1973-1974 incurred by a mentally-retarded minor who temporarily resided at appellant's private care facility. The issue is whether the Commonwealth of Pennsylvania by Act of Assembly[3] may require a private Pennsylvania institution to pay the cost of education in public school of a mentally retarded child residing in such Pennsylvania insti-

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1. *Nelson House v. Tuscarora Intermediate Unit No. 11*, 59 Pa. Cmwlth. 514, 426 A.2d 1234 (1981).

2. Initially, this case was removed to the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 75-1987, but was remanded to the Huntingdon County Common Pleas Court by Order of Edward R. Becker, J., dated December 23, 1976.

3. Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. 13-1301 *et seq.*

tution, where the parents of the child are residents of the State of New Jersey.[4]

The facts of this case are undisputed and as follows: the handicapped child was born on June 11, 1959 of parents who have at all times relevant resided in New Jersey. On June 26, 1972, this lad was transferred by his parents from the Lochland School in Geneva, New York to Nelson House, located in Huntingdon County, Pennsylvania. At this time, the child did not move to New Jersey because a residential facility could not be found there that was suitable to his needs. The trial court determined that this youth was a trainable mentally retarded child suffering from limitations of immature behavior and lack of self-control.

Appellant, Nelson House, is a private institution, licensed by the Pennsylvania Department of Public Welfare, providing residential care for mentally retarded children. Appellant orally agreed with the child's parents to provide the boy with residential support at a cost of $600.00 per month from June of 1972 through the 1975-1976 school year. Appellant, as a private institution, has received no funding from the Commonwealth of Pennsylvania or the State of New Jersey for this child's maintenance or education.

Appellee, Tuscarora Intermediate Unit No. 11, pursuant to the Public School Code[5], enrolled this child in its program for trainable mentally retarded students for the 1973-1974 school year, and billed appellant Nelson House $1,687.09 for the tuition for this period. Appellee did not seek to recover the cost of the child's education from his parents. Appellee received federal funding throughout the 1973-1974 school year when this child was enrolled at Tuscarora Unit No. 11.

In July 1975, appellee brought an action in assumpsit against Nelson House, seeking to recover the cost of the child's education. Nelson House now seeks reversal of that judgment which required appellant to pay such costs.

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4. Jurisdiction is vested in this Court pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, 2, 42, Pa.C.S.A. 724.

5. 24 P.S. §13-1306. Non-resident inmates of children's institutions.

A comprehensive review of the relevant provisions of the Public School Code indicates that appellant was obligated under the Public School Code to pay for the child's education while such child resided at appellant's private institution.

Initially, this child is not entitled to free education by virtue of being a resident of the school district serviced by Tuscarora Unit No. 11. Section 1302 of the Code, 24 P.S. §13-1302 provides in relevant part that, "A child shall be considered a resident of the school district in which his parents or the guardian of his person resides." The youth's parents resided in New Jersey and the Nelson House was not a "guardian" but simply a temporary custodian while the child resided at appellant's residential care facility.

Rather, the Public School Code specifically targets the private institution as bearing the burden of educational costs for out-of-state children that temporarily reside in the institution. Section 1308, 24 P.S. §13-1308, which details the tuition liability for inmates of children's homes, provides in pertinent part: "*If any inmates have been received from outside of Pennsylvania . . . their tuition shall be paid by the institution having the care or custody of said children.*" Moreover, Attorney General Opinion No. 69, dated October 11, 1973 interprets 13 P.S. §13-1308 as follows:

> "The institution is responsible for the public education tuition of out-of-state children. Therefore, *the institution should make arrangements with the parents for the child's educational expense before accepting the child.*
>
> If the out-of-state parents refuse to pay the institution, the institution must bear the expense." Pa. Bulletin, Vol. 3, No. 46, October 27, 1973 (emphasis added)

We find this interpretation of legislative intent to be both accurate and reasonable. Therefore, it is clear that the Nelson House, having accepted this boy into its program at a fee of $600. per month and having been on statutory notice of its obligation for these educational costs, is responsible for the lad's tuition under 24 P.S. §13-1308 of the Pennsylvania Public School Code.

Appellant argues, however, that 24 P.S. §13-1308 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." In support of his equal protection argument, appellant relies upon *Plyler v. Doe*, 50 U.S.L.W. 4650 (1982). In *Plyler*, the Supreme Court struck down a Texas statute as violative of equal protection which called for a withholding of funds from local school districts for education of illegal alien children and which authorized the school districts to deny enrollment to such children. Appellant avers that there is no difference between the illegal alien children that are residing in Texas and the child in the instant case that finds himself a legal resident of New Jersey yet residing in a private institution within the jurisdiction of Pennsylvania. As appellant's argument follows, since the Supreme Court in *Plyler* effectively mandated free public education for illegal aliens in Texas, Pennsylvania must provide the child in this case with a free public education. Therefore, it was improper to charge tuition of the appellant, despite the fact that 24 P.S. §13-1308 holds such institution liable. However, the rationale of the *Plyler* decision does not at all lend itself to the case at bar.

In *Plyler*, the issue was whether Texas could deny educational benefits to a class of persons who found themselves within the boundaries of Texas *illegally*. The Court in *Plyler*, after noting that the minor children of illegal aliens could not affect the conduct of their parents in illegally entering this country, held that the Texas statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives." 50 U.S.L.W. at 4656. Clearly the *Plyler* Court's concerns was with a state's treatment of the minor children of illegal aliens and their holding cannot be extended to require Pennsylvania to provide free public education to the minor children of parents from other states, who decide to have their children raised in a private institution in Pennsylvania.

Quite to the contrary, we find that the statutory scheme of free education under the Pennsylvania Public School Code does

not invidiously discriminate against out-of-state residents in violation of the equal protection clause. Free public education within any school district is available only to residents (as defined in 24 P.S. 13-1302) of that local school district. 24 P.S. 13-1301. And, the board of school directors of any school district may charge tuition to all out-of-district pupils that care to attend public school in their district, whether those pupils are residents of other Pennsylvania school districts or of other states. See 24 P.S. 13-1301, 13-1306. In this regard, Pennsylvania residents are clearly not accorded any special treatment over out-of-state residents under the public school code. Therefore, we find appellant's claim of an equal protection violation to be without merit.

Appellant also asserts that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, was violated by charging Nelson House for the child's education. That section provides in relevant part,

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."

The Department of Health, Education and Welfare (now HHS) promulgated interpretive regulations[6] whose purpose was to effectuate section 504 of the Rehabilitative Act of 1973. Appellant relies upon HEW regulation No. 84.33(a) which provides, "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 45 C.F.R. 84.33(a). Appellant's argument is that Tuscarora

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6 It should be noted that these regulations were not in effect at the time of this controversy in 1973–1974 and, thus, they are not binding. However, a review of these subsequently enacted regulations serves as a meaningful guideline in ascertaining the intended rights and liabilities under this statute.

Intermediate Unit No. 11, as a recipient of federal funding, was obligated to provide this child, as a qualified handicapped individual in its jurisdiction, with a free public education. Therefore, it was improper to charge appellant for this child's tuition.

However, after reviewing cases construing §504 of the Rehabilitation Act of 1973 and reviewing the Act's interpretive regulations, we find that appellant Nelson House does not have standing to assert any rights under this federal statute. The standard for standing under §504 of the Act was set out in *Kampmeier v. Nyquist*, 553 F.2d 296, (2d Cir. 1977), where the second circuit held that students with vision in only one eye, who were refused permission by public school officials to participate in contact sports had standing, along with their parents, to bring suit against school officials under §504 of the Rehabilitation Act of 1973 *because they were the people in the best position to enforce §504, which is designed specifically for their protection*. 553 F.2d at 299 (Emphasis added). As it relates to free public education, §504 of the Rehabilitation Act of 1973 was designed for the protection of the handicapped person or his or her parents or guardian. HEW regulation 84.33 (c)(1) explicitly states, ". . .the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian. . ." And Nelson House has made no claim that they are bringing this suit on the child's behalf or that the child's parents in New Jersey will be refunded any funds in the event appellant were to succeed in this case. Moreover, HEW regulation 84.33 (c)(1) notes, "Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person." 45 CFR 84.33 (c)(1). Nelson House with such a valid obligation under 24 P.S. §13-1308 was clearly never intended to have standing to seek refuge under this federal statute.

For the reasons set forth above, the order of the Commonwealth Court is affirmed.

Former Mr. Chief Justice O'Brien did not participate in the decision of this matter.

EDGAR D. NELSON, TRADING AND DOING BUSINESS AS NELSON HOUSE, *Appellant* : IN THE COMMONWEALTH COURT OF PENNSYLVANIA

v.

TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee* : NO. 51 C.D. 1980

BEFORE: HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE DAVID W. CRAIG, Judge

ARGUED: February 5, 1981

OPINION BY JUDGE CRAIG FILED: March 16, 1981

Appellant Nelson House appeals from a verdict and judgment entered by the Huntingdon County Court of Common Pleas which permitted the appellee Tuscarora Intermediate Unit No. 11 (Tuscarora) to recover $1,687.09 from Nelson House for educational services Tuscarora provided Lawrence Terwilliger (Larry) during the 1973-74 school year.

The facts of this case are not in dispute. During the period relevant to this case, Larry was a mentally retarded minor whose parents resided in New Jersey. In June 1972, Larry's parents and Nelson House, an institution located in Huntingdon County and licensed by the Pennsylvania Department of Public Welfare to provide residential care for mentally retarded children, entered into a private placement arrangement and transferred Larry to Nelson House from the Lochland School, Inc., in Geneva, New York.

Nelson House does not provide educational services. However, for the 1973-74 school year, Tuscarora, pursuant to Section 1306 of the Public School Code of 1949 (Code), Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §13-1306, enrolled Larry in its program for trainable mentally retarded children. In July 1975, Tuscarora brought this suit in assumpsit against Nelson House to recover the tuition for educating Larry during the 1973-74 school year. Tuscarora premised its tuition charge for educating Larry on the fact that his parents were not residents of the school district.

Nelson House first contends that liability cannot be based upon state law, initially claiming that Larry's placement in Nelson House caused him to be a resident within the area serviced by Tuscarora and entitled him to participate in Tuscarora's education program free of tuition.

Section 1302 of the Code, 24 P.S. §13-1302, precludes us from adopting Nelson House's view as to Larry's residence. Section 1302 provides that a child is considered a resident of the school district in which his parents or guardian reside. Here Larry's parents at all times resided in New Jersey. Moreover, we believe that the word "guardian" as used in Section 1302 contemplates legal guardian, and the record is devoid of any evidence suggesting that Nelson House was anything other than Larry's temporary custodian. Thus, Larry was not a resident within the service area of Tuscarora's education program.

Consequently, Nelson House received Larry from out-of-state and, as the institution entrusted with his care and custody, was responsible for paying his tuition. That responsibility is expressly set forth in Section 1308 of the Code, 24 P.S. §13-1308, which reads in pertinent part as follows:

> If any inmates have been received from outside of Pennsylvania, or if the institution cannot certify as to their residence, their tuition shall be paid by the institution having the custody of said children. . . .

Nelson House further contends that Tuscarora, a state agency which receives federal funds, violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, by charging a tuition to educate Larry. That section provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Assuming that Section 504 applies to a person with Larry's handicaps, the fact remains that Larry was not excluded from the program; he received educational benefits without discrimination. As Judge Terrizzi well stated in the opinion below:

> First it must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another County in Pennsylvania.

We agree with the interpretation by the United States Department of Health, Education and Welfare, at 45 C.F.R. 84.33(c) (1), that there is nothing in Section 504 which relieves a third party, such as Nelson House, from valid obligations to pay for services provided a handicapped child.

Tuscarora charged tuition for Larry's education not because Larry was handicapped, but because he was from outside the district. There is no inherent discrimination by Pennsylvania in seeking tuition payment for non-residents of the state educated in Pennsylvania because tuition is also charged for Pennsylvania residents who attend school outside of their district. *See* Section 1316 of the Code, 24 P.S. §13-1316. *See also Ferndale Area School District v. Shawley*, 11 Pa. Commonwealth Ct. 185, 313 A.2d 366 (1973). Thus the class of those charged tuition uniformly embraces all who reside outside the district, so that residents of other states suffer no special disadvantage.

Accordingly, the decision of the court below is affirmed.

DAVID W. CRAIG, *Judge*

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant*	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	:	No. 51 C.D. 1980

ORDER

AND NOW, March 16, 1981, the December 20, 1979 order of the Huntingdon County Court of Common Pleas and judgment thereon is hereby affirmed.

DAVID W. CRAIG,
Judge

COURT OF COMMON PLEAS OF HUNTINGDON COUNTY, PENNSYLVANIA—CIVIL

TUSCARORA INTERMEDIATE UNIT NO. 11,
Plaintiff

v.

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,
Defendant

60 September Term, 1975
IN ASSUMPSIT

OPINION and VERDICT

Plaintiff, Tuscarora Intermediate Unit No. 11, in this proceeding is seeking to recover from the Defendant, Edgar D. Nelson, trading and doing business as Nelson House, the sum of $1,687.09 on the basis of the following factual situation:

Lawrence Terwilliger (hereinafter called Larry), a trainable mentally retarded minor, was born June 11, 1959, to parents who at all times relevant to this proceeding were residents of New Jersey. On June 26, 1972, Larry was transferred from the Lockland School, Inc., Geneva, New York, to the Nelson House, located in Spruce Creek, Huntingdon County, Pennsylvania, at the instance of his parents. Nelson House is a private institution owned and operated by Edgar D. Nelson, licensed by the Pennsylvania Department of Welfare as an institution providing residential care for mentally retarded children. Larry was enrolled in Tuscarora Intermediate Unit No. 11's program for trainable mentally retarded children for 114 days during the 1973-1974 school year. Larry was placed by his parents in Nelson House pursuant to an agreement under which Defendant agreed to provide him with residential support for $600 per month. Plaintiff, without previously seeking to recover the cost of Larry's education from his parents, seeks to recover from the Defendant the cost of educating Larry during the 1973-1974 school year.

Section 1306 of the Act of March 10, 1979, P.L. 30, 24 P.S., 13-1306, provides in sub-section (a) that the Board of School Directors of any school district in which there is located any . . . children's home, or other institution for the care or training of orphans or other children, shall permit any children who are inmates of such homes, but not legal residents in such district, to attend the public schools in said district, either with or without charge for tuition, textbooks or school supplies, as the Directors of the district in which such institution is located may determine. Thus, it is apparent that the option of charging a tuition lies with the Directors of the district supplying the service.

With respect to the liability for the payment of tuition, Section 1308 of the Act of March 10, 1949, P.L. 30, 24 P.S., 13-

1308, provides in pertinent part as follows: "If any inmates have been received from outside of Pennsylvania, . . . , their tuition shall be paid by the institution having the care or custody of said children."

There appears to be no Pennsylvania cases construing the above statutory provisions. However, we do find some guidance in the matter in Official Opinion No. 69 of the Attorney General dated October 11, 1973, addressed to Honorable John C. Pittenger, Secretary, Department of Education. This Opinion states that "In general terms, the public policy of the Commonwealth is that any child living within the state is entitled to attend the public schools. This includes children placed in public or private children's institutions. The burden for the educational expense of a child being educated by the public school system is determined by Statute, Article XIII of the School Code, 24 P.S., Section 13-1301, et seq.

"With regard to children's institutions, . . . , including institutions for the mentally retarded, the following rules and guidelines apply for children receiving public education:

". . . No. 4. The educational expense for children received from outside of Pennsylvania shall be paid by the institution having the care or custody of said children. 24 P.S., Section 13-1308.

"Comment:

"(a). All children within the Commonwealth must be educated. While the Compulsory School Attendance Law refers only to children having a legal residence, it is the intent of 24 P.S., Section 13-1306, that children in children's institutions are entitled to attend the public schools. Such children would include those accepted from parents having an out-of-state legal residence.

"The institution is responsible for the public education tuition of out-of-state students. Therefore, the institution should make arrangements with the parents for the child's educational expense before accepting the child.

"If the out-of-state parents refuse to pay the institution, the institution must bear the expense."

Defendant argues at length the impropriety of charging the cost of Larry's tuition to him, based on the conclusion that Section 504 of Public Law 93-112, 29 U.S.C.A., 794, has applicability. This writer has serious doubts that that section has any application to the subject matter under consideration, in view of the limited definition of "handicapped individual" set forth in Section 706 (6), 29 U.S.C.A., 706 (6).

Be that as it may, the Court recognizes the right of Larry to an appropriate education and his right to that education on a non-discriminatory basis.

The Court has difficulty in following the Defendant's theory. First, it must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another county in Pennsylvania. Secondly, we must recognize the propriety of the Commonwealth of Pennsylvania defining the allocation of the cost of his education.

In arriving at a conclusion in this case, we must recognize that the term "free education" is a misnomer. As stated in Regulation No. 84.33, free appropriate public education, promulgated by the Department of Health, Education and Welfare, implementing Section 504 of the Rehabilitative Act of 1973, 29 U.S.C.A., 706, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents, or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardians.

It is the opinion of this writer that so long as the charge being imposed is non-discriminatory, it is appropriate and is in accordance with the provisions of the Public School Code.

On the basis of the foregoing discussion, the Appeal filed on behalf of the Defendant from the Verdict of the Arbitrators is denied, and the following Verdict is entered:

VERDICT

Verdict is entered in favor of the Plaintiff and against the Defendant for the sum of $1,687.09, with interest thereon from June 20, 1975.

By the Court

_____

President Judge

SUPREME COURT OF PENNSYLVANIA
Eastern District

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE, *Appellant*	No. 81-3-426 (Commonwealth Court No. 51-80)
v.	
TUSCARORA INTERMEDIATE UNIT NO. 11, *Appellee*	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the COMMONWEALTH COURT, be, and the same is hereby AFFIRMED

BY THE COURT:

_____

Marlene F. Lachman, Esq.
Prothonotary

Dated: March 16, 1983

Office - Supreme Court, U.S.
FILED
AUG 31 1983
ALEXANDER L. STEVAS.
CLERK

NO. 82 - 2058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, trading and doing business as NELSON HOUSE,
Petitioner,

V.

TUSCARORA INTERMEDIATE UNIT NO. 11,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF OPPOSING PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGR D. NELSON, trading and doing business as NELSON HOUSE,
Petitioner,

V.

TUSCARORA INTERMEDIATE UNIT NO. 11,
Respondent.

BRIEF OFFPOSING PETITION FOR CERTIORARI

COUNTERSTATEMENT OF THE CASE

Before the Court is an assumpsit action between Tuscarora Intermediate Unit No. 11 (hereinafter Tuscarora)[1] and Edgar D. Nelson, t/d/b/a Nelson House (hereinafter Nelson), seeking to recover a tuition reimbursement in the amount of $1,687.09.

In June, 1972, Nelson entered into a private contract with the parents of Lawrence Fran Terwilliger (hereinafter Larry) to provide residential support for Larry for a fee. Nelson operated a licensed institution in Spruce Creek, Pennsylvania, to provide residential care for mentally retarded children. Tuscarora

---

[1] Tuscarora is an intermediate unit organized under the Pennsylvania Education Code. One purpose is to provide special education services at the request of individual school districts. Established by the Pennsylvania General Assembly, its directors are designated by the school districts which it serves.

was the intermediate unit providing special education services to the school district for Spruce Creek, and during the 1973 - 1974 academic year, Nelson enrolled Larry in Tuscarora for 114 days. Tuscarora sought its tuition charges from Nelson, computed at an average of approximately $14.79 per day.

At the time Nelson undertook to provide services, Larry's parents were residents of the State of New Jersey. Based on the record below, at no time did either of his parents ever enter the Commonwealth of Pennsylvania. Larry and his parents were not made parties to the instant action.

When Nelson enrolled Larry in Tuscarora, the Commonwealth of Pennsylvania, by statute, required a local school district to provide educational services to a nonresident child who was housed in an institution within the

district. 24 P.S. Section 13-1306. However, for a child from outside Pennsylvania, the institution which had accepted him would be responsible for his tuition. 24 P.S. Section 13-1308.

Petitioner claims that Pennsylvania's statutory schema violates Section 504 of the Rehabilitation Act of 1973, 29 USC Section 794, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Respondent contends that there is not a violation of either, that Petitioner has no standing to litigate these issues, and that this is not an appropriate case for the Court to exercise its jurisdiction.

SUMMARY OF ARGUMENT

Pennsylvania's allocation of financial responsibility for education

expenses upon institutions which have accepted non-state residents does not discriminate aginast handicapped individuals, nor does it violate their right to equal protection. Nelson does not have standing to litigate Larry's individual rights in this Assumpsit action. There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT
REHABILITATION ACT

There is no dispute that Larry is a trainable mentally retarded child suffering from limitations of immature behavior and lack of self control. His parents could not locate a suitable residential facility in the State of their residence and so arranged for him to be housed at Nelson. While there, he was educated at Tuscarora.

The Rehabilitation Act of 1973, 29 U.S.C. Section 701, et seq., prohibits discrimination against any handicapped person based on his handicap by any organization receiving Federal financial assistance. 29 U.S.C. Section 794. Concededly, since Larry's impairments limit his major life activities, 29 U.S.C. Section 706(6), Larry is entitled to the protection of the Act. Thus, Tuscorara cannot discriminate against Larry based on his handicap.

However, there was no showing of any such discrimination. To the contrary, Larry received an appropriate education. As Judge Terrizzi found,

> "...[I]t must be conceded that Larry was afforded an education of the same type and quality as he would have been afforded if he were a resident of Huntingdon County living with his parents or a resident in a residential treatment facility placed there by his parents who were residents of another County in Pennsylvania."
>
> Pet. for Writ at A-13

Thus, Larry obtained the benefits required by the Act.

Nelson appears to argue that it is improper to charge Nelson for Larry's tuition. However, regulations promulgated after this controversy arose make it clear that there is nothing in 29 U.S.C. Section 794 that relieves a third party such as Nelson from valid obligations to pay for services provided a handicapped child. 45 C.F.R. Section 84.33.

Finally, Tuscarora did not charge Nelson for Larry's tuition because Larry was handicapped. Tuition reimbursement was sought because he was a nonresident. Under Pennsylvania law, tution reimbursement may be sought from any institution which brings nonresidents into the Commonwealth--handicapped or not.

Clearly, Larry was not discriminated against based on his handicap.

EQUAL PROTECTION

Petitioner argues, without citation, that,

> "It is a violation of the Equal Protection Clause not to provide this child, required under the circumstances to reside in Pennsylvania, with a free public education."
>
> Pet. for Writ at 10.

This contention begs the question for several reasons.

In the first place Larry did receive a public education that was free to him. Under the Education Code as interpreted by the Attorney General and construed by the Pennsylvania Supreme Court in this case, it is the obligation of the Commonwealth to provide such an education to all children within the Commonwealth, whether or not they are state residents. Op. of Pa. Atty. General No. 69, Oct. 11, 1973, 3 Pa. Bull. No. 46, Oct. 27, 1973.

As Judge Terrizzi found, supra., Larry did receive such an education. Thus there has been no abridgement of Larry's education rights.

Moreover, requiring tuition payment from an institution which accepts out of state residents does not unconstitutionally discriminate either. Pennsylvania delivers its education services through the local school districts, and a school district may expect compensation for educating any student from outside its boundaries--if from another district within the State, then from that district, Ferndale Area School District v. Shawley, 1973, 11 Pa. Commonwelth Ct. 185, 313 F.2d 366; if from without the State, then from the institution which agreed to bring him into the State. 24 P.S. Section 13-1308. Thus the class of those for whom tuition is charged uniformly embraces all

who reside outside the district, so that residents of other states suffer no special advantage.

Lastly, if the spectre of being required to reimburse for tuition would somehow impede Larry's parents from obtaining an appropriate free education for him, there is a mechanism whereby funding can be obtained from the entity with the ultimate responsibility for Larry's education--the New Jersey department of education. If the Nelson program could legitimately be said to be the only appropriate program for Larry for educational reasons, then an order requiring New Jersey to pay Nelson could have been sought under the Education of Handicapped Act. 20 U.S.C. Section 1401 et seq. Thus, there exists a means for Larry's parents to compell New Jersey to pay for Larry's education.

STANDING

The instant suit is between Nelson and Tuscarora. Nelson never exercised its right under Pa.R.Civ.P. No. 2252 to bring in Larry's parents or the State of New Jersey as additional defendants. Thus, the litigation before this Court does no involve an intended beneficiary of the Rehabilitation Act, but rather the claim of a business which, for a fee, provides services to handicapped persons.

In a pursuasive decision, the Court of Appeals for the Second Circuit held that handicapped students and their parents had standing to bring suit under the Rehabilitation Act of 1973, "because they were the people in the best position to enforce Section 504, which is designed specifically for their protection." Kampmeier v. Nyquist, 1977, 553 F.2d 296, 299.

This Court has recognized that a person may sue to enforce the rights of others under circumstances in which "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Barrows v. Jackson, 1953, 346 U.S. 249, 257, 73 S.Ct. 1031, 1035, 97 L.Ed. 1586.

In this case however, there is nothing in the record that Larry's parents--who have the strongest interest in assuring that Larry receive an appropriate education--suffer from any impediment which would interfere with their access to the courts. Indeed, their initiative in seeking out and employing Nelson to provide services to their son indicates their interest. If anyone should be litigating Larry's rights, it should be his parents and not Nelson.

Clearly, Nelson has no standing to raise Larry's rights in defense of this assumpsit claim.

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

The decision by the Pennsylvania Supreme Court that enforcement of Tuscarora'a right under Pennsylvania law to tuition reimbursement from Nelson does not infringe Larry's rights under the Rehabilitation Act of 1973 and under the Equal Protection Clause does not conflict with any reported decision from any other State Court of last resort, Federal Court of Appeals or this Court. Indeed, its decision is consistent with the law as interpreted by this Court in San Antonio Independent School District v. Rodriguez, 1973, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed2d 16 and Vlandis v. Kline, 1973, 412 U.S. 441, 93 S.Ct. 2230, 27 L.Ed.2d 63.

In Rodriguez, appellants challenged the Texas educational system on the basis that students in different school

districts received educations based on the different property tax bases in the districts. This Court found that it should not interfere with the method of allocating educational resources adopted by the Texas legislative.

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Taxas has chosen to raise and disburse State and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In doing, appellees would have the court intrude in an area in which it has traditionally deferred to State legislatures.
>
> 411 U.S. 1, 40 (footnote omitted).

In Vlandis, the Court recognized that states would be permitted to give preferential treatment to state residents in setting tuition charges.

> We fully recognize that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the

right of its own bona fide residents to attend such institutions on a preferential tuition basis.

412 U.S. 441, 452 - 453.

Indeed, in the context of higher education, the Court has upheld durational residence requirements. Memorial Hospital v. Maricopa County, 1974, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306.

More recent decisions do not detract from this earlier logic. In Plyler v. Doe, 1982, U.S. , 102 S.Ct. 2382, L.Ed.2d , the Court struck down a provision authorizing school districts to refuse to enroll the children of illegal aliens who were physically present in Texas. As Mr. Justice Blakmun noted in his concurring opinion, this result was not inconsistent with Rodriquez, because "the Court there reserved judgment on the constitutionality of a state system that 'occasioned an absolute denial of

educational opportunities to any of its children'..." ____ U.S. at ____, 102 S.Ct. at 2404. In Martinez v. Bynum, 1983, ____ U.S. ____, 103 S.Ct. 1838, 75 L.Ed.2d 879, the Court upheld a residence requirement for tuition-free education.

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.
>
> Id., 103 S.Ct. 1842 - 43.

Pennsylvania does not deny educational opportunities to any group of children within its boundaries. What it does do is require that any institution bringing in non-residents reimburse the

school district for services provided. This practice is in harmony with each of the foregoing decisions.

CONCLUSION

Every school-aged child within the Commonwealth of Pennsylvania is offered a free appropriate public education. If his parents or guardian reject that public education, it automatically follows that they must arrange for a private education for their child. Normally, this involves either a direct or indirect payment by the parents or guardian of the child. Even when the child is given a free appropriate public education through the school system, in reality that education is never free. In fact, education costs money and it is paid for by the taxpayers. It is only reasonable, equitable and lawful, therefore, for the taxpayers of a jurisdiction, through their local

educational agency, to assess a charge by way of tuition for a nonresident child who comes within their jurisdiction and benefits from the school system which they support with their taxes. Likewise, it is only reasonable, equitable and lawful that the institution which is responsible for accepting that nonresident school-aged child into the school district either make the appropriate arrangements for the payment of that tuition from responsible parents when accepting the child, or failing to do so, should be held responsible itself for failure to make such arrangements. Since Pennsylvania law applies this tuition requirement, at the discretion of the Board of Education, equally to Pennsylvania residents who want their children to attend school in another district than their residence, as well as to nonresidents of Pennsylvania, the

Pennsylvania statutory scheme is not violative of Rehabilitation Act of 1973 or the Equal Protection Clause of the Fourteenth Amendment.

Therefore, the Court should decline to issue certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

MILLER, KISTLER & CAMPBELL, INC.

By: _____
H. Amos Goodall, Jr., Esq.

Dated:

MOTION FILED
JUL 1 1983

No. 82-2058

In the Supreme Court of the United States

October Term, 1982

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

MOTION TO INTERVENE AND BRIEF IN OPPOSITION OF THE COMMONWEALTH OF PENNSYLVANIA

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No. 82-2058

IN THE SUPREME COURT OF THE UNITED STATES

EDGAR D. NELSON, trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

MOTION OF COMMONWEALTH OF PENNSYLVANIA TO INTERVENE

The Commonwealth of Pennsylvania (Commonwealth), by its Attorney General, LeRoy S. Zimmerman, hereby moves this Court, pursuant to 28 U.S.C. §2403(b), to permit the Commonwealth to intervene in this case as a respondent. In support of this motion, the Commonwealth avers, as follows:

1. In the Petition for Writ of Certiorari filed in this case, petitioner has drawn into question the constitutionality of Pa. Stat. Ann. tit. 24, §§13-1301 and 13-1302 (Purdon 1962 and Supp. 1983), which, taken together, guarantee a free public education to children in the school district in which they reside; a child is deemed to reside in the school district in which his parents or guardian resides.

2. Also challenged on constitutional grounds is Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983), which

imposes upon resident case facilities the obligation to pay public school tuition for children "received from outside Pennsylvania".

3. The respondent, Tuscarora Intermediate Unit No. 11, is not an agency of the Commonwealth.

4. The Commonwealth desires to intervene for the purpose of filing a brief in opposition to certiorari and participating in such further proceedings as this Court should order.

5. The Commonwealth is entitled to intervene by virtue of 28 U.S.C. §2403 (b).

WHEREFORE, the Commonwealth respectfully requests that this Court issue an order permitting the Commonwealth to intervene as a respondent.

Respectfully submitted,

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BY: ANDREW S. GORDON
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Dated: July 29, 1983

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION

QUESTIONS PRESENTED

---

1. Whether a residential care facility for children has standing to assert a child's constitutional or statutory rights as a defense to a claim by a local school authority for payment of tuition on behalf of the child for the education of the child in public schools.

2. Whether Pennsylvania statutes which require payment of tuition on behalf of children whose parents reside outside the school district in which the child is attending school violates equal protection or Section 504 of the Rehabilitation Act of 1973 when applied to a retarded child placed in a Pennsylvania residential care facility and whose parents live outside Pennsylvania.

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No. 82-2058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

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OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. A-1—A-6) is reported at 457 A.2d 1260. The opinion of the Pennsylvania Commonwealth Court (Pet. App. A-7—A-9) is reported at 57 Pa. Commonwealth Ct. 514, 426 A.2d 1234. The opinion of the Court of Common Pleas of Huntingdon County (Pet. App. A-10—A-14) is not reported.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on March 16, 1983. The petition for writ of certiorari was filed on June 13, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

STATUTES INVOLVED

1. Pa. Stat. Ann. tit. 24, §13-1302 (Purdon Supp. 1983), provides as follows:

> §13-1302. Residence and right to free school privileges
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> A child shall be considered a resident of the school district in which his parents or the guardian of his person resides. Federal installations are considered a part of the school district or districts in which they are situate and the children residing on such installations shall be counted as resident pupils of the school district. When a resident of any school district keeps in his home a child of school age, not his own, supporting the child gratis as if it were his own, such child shall be entitled to all free school privileges accorded to resident school children of the district, including the right to attend the public high school maintained in such district or in other districts in the same manner as though such child were in fact a resident school child of the district, and shall be subject to all the requirements placed upon resident school children of the district. Before accepting such child as a pupil, the board of school directors of the district may require such resident to file with the secretary of the board a sworn statement that he is a resident of the district, that he is supporting the child gratis, that he will assume all personal obligations for the child relative to school requirements, and that he intends to so keep and support the child continuously and not merely through the school term.

2. Pa. Stat. Ann. tit. 24, §13-1308, provides in pertinent part, as follows:

> If any inmates have been received from outside of Pennsylvania, or if the instiuttion cannot certify as to their residence, their tuition shall be paid by the institution having the care or custody of said children, except in the case of medically indigent children hospitalized in exclusively charitable children's hospitals exempt under section 501 (c) (3) of the Internal Revenue Code which make no charges to any of its patients nor accepts any third-party payments for services provided to any of its patients. In such cases their tuition shall be paid by the Commonwealth out of moneys appropriated by the General Assembly for the purposes of this act. Enrollment of any out of state student in a school district or intermediate unit program shall be conditioned upon a guarantee, or actual advance receipt, of tuition and transportation payment from the institution, from the student's home state or out-of-state school district, or from the out-of-state party or agency which placed the student in the institution. . . .

3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

The undisputed facts are summarized in the opinion of the Supreme Court of Pennsylvania (Pet. App. A-1—A-6). The case was commenced by respondent, Tuscarora Intermediate Unit No. 11 (hereinafter "Intermediate Unit"),[1] in the Court of Common Pleas of Huntingdon County, Pennsylvania, against petitioner Edgar D. Nelson, Trading and Doing Business as Nelson House. Nelson House is a state-licensed private residential care facility for mentally retarded children.

In its complaint, the Intermediate Unit sought payment from Nelson House of tuition for the education of Lawrence F. Terwilliger during the 1973-74 school year.[2] The Intermediate Unit based its complaint upon a state statute which requires residential housing facilities to pay the tuition of children who are received by the facilities from outside the state. *See* Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983).[3] Lawrence Terwilliger, whose parents are residents of New Jersey, was transferred

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[1] Tuscarora Intermediate Unit was described in the complaint as "a municipal corporation." Intermediate units are groups of school districts which have been combined for purposes of providing students residing within the component districts with special education programs. See Pa. Stat. Ann. tit. 24, §§9-951—9-974; 22 Pa. Code §§13.11, 13.13, 17.1-17.4.

[2] The tuition cost for 1973-74 school year was $1,687.09.

[3] The facility is permitted to recover the tuition cost from the child's parents or other person responsible for the child. Op. Pa. Att'y. Gen., No. 69, 1973, 3 Pa. Bulletin No. 461 (October 27, 1973).

to Nelson House from a school in New York. Apparently, there was no residential facility in New Jersey which could suitably house him.

Petitioners claimed in defense that requiring the residential facility to pay for (and presumably pass on to the child's parents) the cost of tuition for children received from out of state violated equal protection and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The Court of Common Pleas (Pet. Ann. A-10—A-14), the Commonwealth Court (Pet. App. A-7—A-9) and the state Supreme Court (Pet. App. A-1—A-6) each, in turn, rejected these claims.[4] In rejecting petitioner's claim that Pennsylvania's statutory scheme does not discriminate against out-of-state residents, the Supreme Court observed that tuition is charged for all out-of-district residents, regardless of whether the child resides elsewhere in Pennsylvania or in another state (Pet. App. A-5). With respect to the claim under the Rehabilitation Act, that court concluded that petitioner lacked standing to press the claim (Pet. App. A-6).

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[4] Initially, the case was removed to federal court, but prior to trial it was remanded to state court.

ARGUMENT

1. Petitioners contend (Pet. 8-10), relying upon *Plyler v. Doe*, No. 80-1538 (June 15, 1982), and *Martinez v. Bynum*, No. 81-857 (May 2, 1983), that it was a violation of equal protection for the Intermediate Unit to require Nelson House to pay school tuition for Lawrence Terwilliger. This claim is without merit because Nelson House lacks standing to raise the constitutional issue and because it is not a denial of equal protection for Pennsylvania to require payment for the education of non-resident children.

a. *Plyler* and *Martinez* were cases brought by a guardian and a next friend on behalf of children who either were denied a public school education entirely *(Plyler)* or were required to pay tuition to attend school *(Martinez)*. In this case neither Lawrence Terwilliger nor his parents, or other personal representative is a party. Instead, the party seeking to press the constitutional claim is Nelson House, a residential care facility which, under Pennsylvania law,[5] is responsible for payment of public school tuition for students received from another state.

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[5] Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983). The state Attorney General has interpreted this provision to require the institution to "make arrangements with the parents for the child's educational expense before accepting the child. If the out-of-state parents refuse to pay the institution, the institution must bear the expense." Op. Att'y. Gen., No. 69, 1973, 3 Pa. Bulletin No. 46 (October 27, 1973). Petitioner never sought to recover the tuition cost from Terwilliger's parents. (Pet. 6).

The essence of petitioner's constitutional claim is that Pennsylvania's tuition requirement, as applied to the facts of this case, violates Terwilliger's right to be treated in the same manner as children who reside in Pennsylvania. But, of course, there is no allegation that petitioner's own constitutional rights have been violated. Presumably, the fact that institutions such as petitioner are denominated by statute as being responsible for the payment of tuition for children received from another state is sufficient to permit petitioner to satisfy the injury in fact requirement of Article III. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This conclusion does not settle the standing question.

The Court has designed prudential rules of standing to ensure that only "proper proponents of the particular legal rights" at issue are permitted to press claims. *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). "Ordinarily one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). This rule has the salutory effect of avoiding the unnecessary adjudication of constitutional issues while ensuring that only the best proponents of the constitutional rights are permitted to seek vindication of those rights. *Singleton v. Wulff, supra*, 428 U.S. at 114.

Nevertheless, in narrowly limited circumstances this Court has permitted a litigant to assert the rights of a third party. But those exceptions to the general rule of standing are limited to situations in which the litigant has so close a relationship to the third party as to be as nearly an effective proponent as the third party,[6] or to circumstances in which there is a serious and genuine obstacle to the third

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[6] *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

party's assertion of his rights.[7] *See Singleton v. Wulff, supra.*

The circumstances of this case do not warrant an exception to the rule that one may assert only his own constitutional rights. Petitioner does not have a close, "confidential" relationship with the child for whom it provided living quarters. Petitioner stands in the position of a merchant providing services to a paying customer. There is no basis for a conclusion that petitioner is "as effective a proponent of the right" as the child. *Singleton v. Wulff, supra,* 428 U.S. at 115.

Likewise, there is no genuine barrier which will prevent children such as Terwilliger from asserting their rights. In fact, the only reason why Terwilliger did not seek relief on his own is petitioner's inexplicable failure to pass on to the child's parents the cost of school tuition. This case hardly presents the type of situation in which this Court has permitted third-party litigation in order to ensure that there exists an avenue for meaningful vindication of important rights. Compare *NAACP v. Alabama,* 357 U.S. 449, 459 (1958) (assertion of right by persons directly affected "would result in nullification of the right at the very moment of its assertion").

For these reasons, petitioner lacks standing to press the constitutional issue.

b. Even assuming that petitioner has standing to raise the constitutional claim, it is plainly without merit. In *Martinez* the Court observed, "We specifically have approved bona fide residence requirements in the field of

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[7] *See, e.g., NAACP v. Alabama,* 357 U.S. 449 (1958).

public education." Slip op. at 5. The Court went on to note that, "A bona fide residence requirement, appropriately defined and uniformly applied . . . does not violate the Equal Protection Clause of the Fourteenth Amendment." Slip op. at 7.

In determining whether the Texas statute at issue in *Martinez* qualified as an appropriately defined residence requirement, the Court looked to the traditional, common-law concept of residence. The Court determined that a residence requirement which meets the common-law test likewise satisfies constitutional requirements. Slip op. at 10-12.

The common-law rule, both generally and in Pennsylvania, is that a minor's residence or domicile follows that of his parents (or the parent with legal custody). *Bergen v. Bergen*, 439 F.2d 1008 (3d Cir. 1971); *Shishko v. State Farm Insurance Co.*, 553 F. Supp. 308 (E.D. Pa. 1982); *In Re Huck*, 435 Pa. 325, 257 A.2d 522 (1969); Restatement (Second) of Conflict of Laws, §22 and comment a (1971). This is precisely the rule found in the statute at issue here. *See* Pa. Stat. Ann. tit. 24, §13-1302 (Purdon Supp. 1983). Moreover, as this Court observed in *Martinez*:

> At the very least, a school district generally would be justified in requiring school-age children *or their parents* to satisfy the traditional, basic residence criteria—i.e., to live in the district with a bona fide intention of remaining there—before it treated them as residents.

Slip op. at 11 (emphasis supplied; footnote omitted). Accordingly, there is no constitutional objection to Pennsyl-

vania's employment of traditional concepts of residence to define those persons entitled to a free public education.[8]

2. Petitioner's remaining argument (Pet. 10-11) is that Pennsylvania's tuition requirement, as applied to a mentally retarded child such as Lawrence Terwilliger, violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. This claim plainly lacks merit.

For many of the same reasons which compel the conclusion that petitioner lacks standing to raise the constitutional issue (see pp. 7-11, *supra*), it also cannot press the Section 504 claim. As the state Supreme Court noted in disposing of petitioner's claim (Pet. App. A-6), it is the handicapped person whom Section 504 is designed to protect and who is in the best position to enforce it. *See Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977).

In any event, Section 504 merely prohibits the denial of benefits to or discrimination against an "otherwise qualified handicapped individual." The state statutes at issue here do not conflict with this prohibition. The statutory scheme merely furthers "the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Martinez v. Bynum, supra*, slip op. at 7. Lawrence Terwilliger was not permitted to attend Pennsylvania public schools free because he was a non-resident, not because he was handicapped. Missing from petitioner's Section 504 claim is the crucial element of discrimination based upon handicap.

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[8] Clearly, *Plyler v. Doe, supra*, does not support petitioner's position. That case merely held that a state cannot discriminate against resident children who are not United States citizens by refusing to permit them to go to local schools for free or otherwise. Here, by contrast, the question is whether a state may deny free education to non-resident students.

For these reasons, petitioner's Section 504 claim must be rejected.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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